Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

DONALD E. GHIDONI,

Petitioner,

v.

HILL COUNTY S.A. LTD and JOHNNY W. THOMAS,
Chapter 7 Trustee for the Estate of Donald E. Ghidoni,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DID THE DECISIONS MADE BELOW BY THE BANKRUPTCY COURT, THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS VIOLATE THE GOVERNING PROCEDURAL PRINCIPLES FOR ADJUDICATING SUMMARY JUDGMENT MOTIONS BY FINDING THAT THE DOCTRINE OF *RES JUDICATA* BARRED PETITIONER'S COLLATERAL ATTACK WHERE A FINAL JUDGMENT DOES NOT EXIST IN EITHER THE STATE TRIAL COURT OR STATE APPELLATE COURT; AND FURTHER FINDING THAT PETITIONER DID NOT FILE AN OBJECTION TO THE ASSIGNED JUDGE BECAUSE THE OBJECTION ATTACHED TO THE SUMMARY JUDGMENT AFFIDAVIT DID NOT BEAR A FILE STAMP OF THE STATE DISTRICT COURT CLERK WHERE PETITIONER'S SUMMARY JUDGMENT PROOF CONCLUSIVELY ADDUCED THAT THE OBJECTION WAS TIMELY FILED AND PRESENTED TO THE ASSIGNED JUDGE PRIOR TO COMMENCEMENT OF TRIAL AND THE TEXAS SUPREME COURT HAS HELD A FILE STAMP IS NOT CONTROLLING TO PROVE A DOCUMENT WAS FILED.

II DID THE BANKRUPTCY COURT, THE DISTRICT COURT AND THE COURT OF APPEALS COMMIT ERROR BY CONTINUING TO EXERCISE JURISDICTION AFTER THE BANKRUPTCY COURT RULED THAT THE ROOKER-FELDMAN DOCTRINE APPLIED TO PETITIONER'S COLLATERAL ATTACK AND THEN ADJUDICATING PETITIONER'S COLLATERAL ATTACK ON THE MERITS INSTEAD OF DISMISSING WITHOUT PREJUDICE TO PERMIT PETITIONER TO FILE A MANDAMUS PROCEEDING OR COLLATERAL ATTACK IN STATE COURT.

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The Per Curium Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit in *In re Donald E. Ghidoni* is unreported and set forth in the Appendix hereto. (App. la-3a).

The Order of the United States District Court of the Western District of Texas, San Antonio Division in *In re Donald E. Ghidoni* is unreported and set forth in the Appendix hereto (App.3a).

The Judgment Granting Motion for Summary Judgment of Defendant, Hill Country S.A., Ltd. is unreported and *set* forth in the Appendix hereto (App.10a).

BASIS FOR JURISDICTION

The Final Judgment of the United States Court of Appeals for the Fifth Circuit, affirming the District Court for the Western District of Texas, San Antonio Division, was entered on August 17, 2001 (App.19a). This petition for writ of certiorari is filed with 90 days from that date. 28 U.S.C. §2101(c).

The jurisdiction of this Court is invoked pursuant to the provision of 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

United States Constitution,
Amendment VII - Civil Trials:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be

otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Federal Rules of Civil Procedure, Rule 56:

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary,

the court at the hearing of the motion, by examining the pleadings and the evidence before it and by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exists without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers and parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specified facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may

refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudicated guilty of contempt.

Texas Government Code §74.053:
OBJECTION TO ASSIGNED JUDGE

(a) When a judge is assigned under this chapter the presiding judge shall, if it is reasonable and practicable and if time permits, give notice of the assignment to each attorney representing a party to the case that is to be heard in whole or part by the assigned judge.

(b) If a party to a civil case files a timely objection to the assignment, the judge shall not hear the case. Except as provided by Subsection (d), each party to the case is only entitled to one objection under this section for that case.

(c) An objection under this section must be filed before the first hearing or trial, including pretrial hearing, over which the assigned judge is to preside.

(d) A former judge or justice who was not a retired judge may not sit in a case if either party objects to the judge or justice.

STATEMENT OF CASE

On December 22, 1992 Petitioner, Donald E. Ghidoni ("Ghidoni") was sued by Stone Oak, Inc., Respondent, Hill Country S.A. Ltd. ("HCSA")'s predecessor in interest in a commercial landlord-tenant dispute seeking a declaration of the parties' rights under a lease and subsequent settlement agreement entered in a prior litigation. Ghidoni's ex-wife ("Sheehan") intervened seeking a recission of a deed she gave to Ghidoni concerning the leased property. On August 15, 1994 the case was called for trial and assigned to former judge, Hon. Peter Michael Curry. After notice of the assignment, and before the first hearing or trial in the case, Ghidoni filed a written objection to the assignment of Judge Curry.

The trial court reporter's record, included in Ghidoni's response to HCSA's motion for summary judgment, recites that before any trial proceedings began, Ghidoni's written objection was the first issue that was presented to Judge Curry. Judge Curry overruled the objection on the basis that he had previously heard a motion for summary judgment in the case. Ghidoni's summary judgment evidence also includes, as part of the state trial court record, the trial court clerk's docket sheet. The docket sheet does not show that Judge Curry was assigned to hear any pretrial motion in the state court litigation. Moreover, Ghidoni's summary judgment evidence included an order denying the motion for summary judgment that was signed by another judge. There is no evidence in the trial court record that Judge Curry signed any order or heard any pretrial matter in the state court proceeding.

Judge Curry then proceeded to conduct the trial, and after verdict and granting a partial directed verdict, signed a final judgment. Ghidoni then raised the issue that Judge Curry had erroneously overruled the objection to his

assignment in a motion for new trial presented to Judge Curry. Again, Judge Curry denied the motion on the basis that he had heard a motion for summary judgment.

Ghidoni appealed the judgment signed by Judge Curry to the Fourth Court of Appeals, San Antonio Division. Ghidoni did not urge in his appeal the issue of lack of jurisdiction as a result of Judge Curry's erroneous overruling of the objection to his assignment. The state court of appeals affirmed in part the trial court judgment as it affected HC SA' s claim against Ghidoni, and remanded for further proceedings with respect to Sheehan's claim against Ghidoni. The trial court proceedings after remand are still pending trial. A final judgment disposing of all the parties and claims has not been entered.

Based on the judgment signed by Judge Curry, HCSA filed an abstract of judgment purporting to create a lien on the portion of Ghidoni's property made the subject of the landlord-tenant dispute. Ghidoni filed a petition in the instant bankruptcy case, and, with HCSA as his sole creditor, filed a series of objections to HCSA's claim. The last objection was an adversary proceeding collaterally attacking the state court judgment asserting that the judgment was void *ab initio* because it was entered by Judge Curry who did not have the capacity to act as a court after Ghidoni had timely filed his objection, and timely presented the objection to Judge Curry.

HCSA moved for summary judgment. Ghidoni timely filed a response. The bankruptcy court granted the motion finding that "Ghidoni did not provide any evidence, such as a file-marked copy of the objection or a docket sheet from the state court litigation, to show that any objection was filed." The bankruptcy court concluded "[t]herefore, any objection was untimely because it was not filed before trial."

The Bankruptcy Court did not consider (1) the trial court's reporter's record showing that Ghidoni's trial court counsel presented the written objection to Judge Curry before the commencement of any proceeding, (2) the copy of the objection adduced at the motion for rehearing and (3) his trial counsel's affidavit stating the objection was filed with the court clerk.

The Bankruptcy Court then concluded the Rooker-Feldman Doctrine applied. Although application of the Rooker-Feldman doctrine deprives federal lower courts ofjurisdiction, the bankruptcy court did not dismiss the adversary proceeding, but ruled that *res judicata* barred Ghidoni's collateral attack because Judge Curry denied Ghidoni's motion for new trial in which Ghidoni re-urged Judge Curry's mandatory recusal, and then Ghidoni pursued an appeal without raising the juridictional question that Judge Curry did not have authority to act as a court, conduct the trial, enter a final judgment and deny the motion for new trial.

The District Court affirmed. On appeal to the Court of Appeals, the Court of Appeals affirmed, ruling that Ghidoni's failure to raise the jurisdictional issue on appeal precluded a collateral attack.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW BY THE BANKRUPTCY COURT, THE DISTRICT COURT AND THE COURT OF APPEALS RULING THAT GHIDONI'S COLLATERAL ATTACK ON THE STATE COURT JUDGMENT IS BARRED BY *RES JUDICATA* WHERE (1) TUE STATE TRIAL COURT JUDGMENT IS VOID AND OF NO PRECLUSION EFFECT BECAUSE IT WAS ENTERED BY AN ASSIGNED JUDGE WHO LACKED AUTHORITY TO ACT IN A JUDICIAL CAPACITY AND (2) THE SUBSEQUENT JUDGMENT OF THE STATE COURT OF APPEALS WAS VOID BECAUSE, WITHOUT A FINAL TRIAL COURT JUDGMENT, THE APPELLATE COURT WAS WITHOUT JURISDICTION; AND DISMISSING PETITIONER'S COLLATERAL ATTACK WITH PREJUDICE BY DISREGARDING PETITIONER'S SUMMARY JUDGMENT EVIDENCE DENIES PETITIONER'S RIGHT TO A TRAIL ON THE MERITS.

In a summary judgment proceeding, the trial court judge is not to weigh the summary judgment evidence. The trial court is limited to examining the summary judgment evidence in the light most favorable to the non-movant to determine if a genuine issue of material fact exists for determination at a trial on the merits. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, *247-250* (1986). The bankruptcy court violated this fundamental role of the court in summary judgment proceedings when it decided disputed material facts against Ghidoni at the summary judgment stage, and incorrectly applied the law of *res judicata.* As a result,

Ghidoni was denied a trial on the merits.

On appeal, an order granting summary judgment is reviewed *de novo*. The reviewing court must view the evidence in a light most favorable to the party against whom judgment was had in order to determine whether there are any genuine issues of material fact, and whether the lower courts correctly applied the law to the undisputed facts, *In re De Laurentis' Entertainment Group, Inc,* 963 F.2d 1269, 1271-1272 (9" Cir. 1992) *cert. denied, 506* U.S. 918 (1992).

The federal courts, having been presented with a collateral attack of a state court judgment, must look to the law of state that rendered. the judgment to determine if the judgment is void, and, thus, without preclusive effect. *Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373 *(1985) cited in, In re Goober,* 100 F.3d 1195, 1201 (5th Cir. 1996).

Texas law is well settled that an aggrieved party may collaterally attack a void judgment at any time and in any court. *See, e.g., In re Camp,* 59 F.3d 548, *550-55* 1 *(5th* Cir. 1995)(citing to *Dews* v. *Floyd,* 413 *S.W.2d* 800, 804-805 (Tex. Civ. App. - Tyler 1967, no writ)). The *Dews* Court opined [w]hen the judgment is not merely erroneous, but an absolute nullity, it can have no binding force or effect, either in the tribunal in which it is rendered, or in any other in which it may be brought in question. *Dews,* 413 S.W.2d at 805 (emphasis in original)(citing to *Milan County v. Robertson,* 47 Tex. *222,* 232 (1877)).

The state court judgment is void because it was entered by a disqualified judge. Texas law provides that where a visiting judge is assigned to hear a case, a party may object to the assignment. Tex. Govn't Code Anno. §74.053 (Vernon's 1998). Section 74.053 provides in pertinent part: "(b) if a party to a civil case files a timely objection to the

assignment, the judge shall not hear the case."

Texas law is well settled that once an objection is timely filed and presented "the judge's subsequent orders are void." *Dunn v. Street*, 938 S.W.2d 33, 35 (Tex. 1996); *Flores v. Banner*, 932 S.W.2d 500, 501 (Tex. 1996). In the case at bar, Ghidoni timely filed an objection to the assignment of Judge Curry. Thus, the judgment signed by Judge Curry was void as a complete nullity.

In the case at bar, the Court of Appeals opined that "[a]ny problems with [the trial court judgment] should have been corrected on direct appeal." The Court of Appeals misapplied Texas law. The state court of appeals' judgment is void because the court had no jurisdiction, where, as in the case at bar, the state trial court judgment is void. *See, City of Houston* v. *Kilburn*, 849 S.W.2d 783, 787-788 (Tex. App. Austin 1981, no writ)(court of appeals lacks jurisdiction over incomplete judgments)(fundamental error may be determined by review of the record).

It is equally well settled that a void judgment cannot be a basis for the application of *res judicata*. *See*, *Sheppard v. Pepper*, 133 U.S. 626 (1890); In re Goober, 100 F.3d 1195, 1202 (5th Cir. 1996).

Significantly, under Texas law, an aggrieved party seeking to challenge a trial court judge's acts after improperly overruling a timely filed objection to the assignment must do so by mandamus. *Lewis v. Leftwick*, 775 S.W.2d 848, 851 (Tex. App. San Antonio 1989, orig. proceeding), *cited in, Dunn*, 938 S.W.2d at 35. Mandamus is appropriate because the appellate courts are without jurisdiction to consider a direct attack on appeal where the trial court judgment is void. Thus, a direct attack by appeal is not available. The attack must be made to the appellate court by mandamus, or in the trial courts by collateral attack.

A void judgment, therefore, is subject to collateral attack in federal court. *In re Goober*, 100 F.3d at 1202 (citing to *Browning* v. *Placke*, 698 S.W.2d 362, 363 (Tex. 1985)). Such a collateral attack is not barred by the proceedings of a state appellate court acting without jurisdiction.

> A void judgment has been termed a mere wastepaper, an absolute nullity; and all acts performed under it are also nullities. Again, it is said to be in law no judgment at all, having no force or effect, conferring no rights, and binding nobody. It is good nowhere and bad everywhere, and neither lapse of time nor judicial action can impart validity.

Dews, 413 S.W.2d at 804 (emphasis added.)

In summary, the court of appeals misapplied Texas law ruling that *res judicata* barred Ghidoni's collateral attack where the trial court judgment and the state appellate court proceeding are void.

The Bankruptcy Court also denied Ghidoni a trial on the merits when it ruled that Ghidoni's collateral attack was barred by *res judicata* as a result of the state appellate court proceedings.

In addition, the Bankruptcy Court disregarded Ghidoni's summary judgment evidence showing that the §74.053 objection was timely filed and presented when it ruled that because the objection did not bear the trial court clerk's file stamp the objection had not been timely filed. The Texas Supreme Court has held that a document is "filed" when it is presented to the court. In the case at bar, the trial court record clearly shows the written objection was presented to the court. Thus, the absence of a "file stamped"

copy is not controlling in a summary judgment proceeding. *See, Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1993).

The lower court's misapplication of Texas law and federal summary judgment procedure denied Ghidoni a trial on the merits in federal court, or alternatively denied his right to a jury trial in a state court proceeding.

2. THE BANKRUPTCY COURT ORDER GRANTING HCSA'S MOTION FOR SUMMARY JUDGMENT AFFIRMED BY THE DISTRICT COURT AND COURT OF APPEALS FINDS THAT THE ROOKER-FELDMAN DOCTRINE APPLIES TO THE CASE AT BAR DENIED THE FEDERAL COURTS OF JURISDICTJON TO RULE ON THE MERITS OF GHIDONI'S COLLATERAL ATTACK AND PRECLUDING A JURY TRIAL ON THE MERITS IN STATE COURT.

The bankruptcy court order granting HSCA's motion for summary judgment concludes in part that the Rooker-Feldman doctrine applies. The Rooker-Feidman doctrine deprives lower federal courts of jurisdiction to review the decision of state court. The only permissible review of a state court judgment is by *writ of certiorari* to the United States Supreme Court. *See, Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923).

As a result, the lower federal courts upon a finding that they lack jurisdiction must dismiss without prejudice. *See, United States v. Sheppard*, 23 F.3d 923, 924 (5th Cir. 1994).

In the case at bar, the bankruptcy court, upon concluding that the Rooker-Feldman doctrine applied was required to dismiss without prejudice Ghidoni's collateral

attack which would permit him to pursue his state court remedies of mandamus or collateral attack with disputed fact issues resolved by a jury.

The bankruptcy court order as it now stands, affirmed by the district court and court of appeals, is, on its face, subject to a collateral attack for want of jurisdiction.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Fifth Circuit and, ultimately, to vacate and reverse the final judgment below and remand the matter to the Bankruptcy Court for dismissal without prejudice or for trial.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-51213

In the Matter Of: DONALD E. GHIDONI
Debtor

DONALD E. GHIDONI,
Appellant,

v.

HILL COUNTY S.A. LTD and JOHNNY W. THOMAS,
Chapter 7 Trustee for the Estate of Donald E. Ghidoni,
Appellees.

Appeal from the United States District Court for the
Western District of Texas (SA-00-C V-8 15)

Before SMITH, DUHÉ, and WIENER, Circuit Judges.

PER. CURIAM:*

The debtors Donald Ghidoni appeals the district court's affirmance of the bankruptcy court's entry of summary judgment denying what amounts to a collateral attack on a state court judgment. We have examined the briefs and applicable law and pertinent portions of the record and have heard the arguments of counsel.

We conclude that the stale court judgment was not void and was, at most, only voidable. Any problems with that judgment should have been corrected on direct appeal within the state court system.

Ghidoni's continuing efforts in federal court are barred by the doctrine of res judicata. The judgment of the district court, accordingly, is AFFIRMED.

Footnotes

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil No. SA-00-CV-0815 HG

IN RE: DONALD E. GHIDONI
Debtor

DONALD E. GHIDONI,
Appellant,
v.

HILL COUNTY S.A., LTD.,
Appellee.

Appeal From:
Bankr. No. 96-50921-K
Adv. No. 00-5026 K

ORDER

On this day came on to be considered Appellant Donald E. Ghidoni's ("Ghidoni") Appeal From a Judgment of the Bankruptcy Court [Docket No, 5], Appellee Hill Country S.A., LTD.'s ("HCSA") Response thereto [Docket No. 6], and Ghidoni's Reply [Docket No. 9]. The Court, after considering the pleadings on file in this matter, finds that Ghidoni' s appeal lacks merit and hereby AFFIRMS the decision of the Bankruptcy Court.

Background

HCSA intervened as plaintiff in an action brought on December 22, 1992 in State court, seeking declaratory judgment to determine the rights of parties under a lease

agreement. Trial was to be held before visiting Judge Peter Michael Curry. Ghidoni objected to the assignment of Judge Curry under Tex. Gov. Code § 74.053. The objection, presented to Judge Curry before trial, was overruled. Judge Curry signed a Final Judgment on September 1, 1994, based on a jury verdict in favor of HCSA. Ghidoni appealed the Judgment to the Fourth Court of Appeals, which affirmed in part and reversed and remanded in part. Ghidoni then filed a petition for review with the Texas Supreme Court, which was denied.

HCSA then sat as judgment creditor in Ghidoni' s first Bankruptcy case, flied in 1995. During the case, which was converted from Chapter 7 to Chapter 11, HCSA objected to Ghidoni' s claim for homestead exemption to certain real property. The Bankruptcy Court sustained the objection in its Judgment, filed on November 13, 1995. This decision was appealed to the District Court, which remanded the case to Bankruptcy Court to correct clerical errors in the Judgment. Otherwise, the District Court affirmed the Bankruptcy Court's decision denying the homestead exemption. Ghidoni appealed to the Fifth Circuit, which affirmed the decision of the District Court.

In 1996, Ghidoni filed his second bankruptcy case. Ghidoni again made a claim for exempt homestead status in the same property and HCSA objected. Again, the Bankruptcy Court sustained the objection and the District Court dismissed the case on appeal. The Fifth Circuit affirmed the District Court in an Opinion dated October 3, 1997. On February 2, 2000, Ghidoni filed his Original Complaint with the Bankruptcy Court. He sought to have the Bankruptcy Court disallow HCSA's claim or allow it only as a contingent unsecured claim. He further sought declaratory relief for a finding that Judge Curry's Final Judgment was void. Ghidoni also asked for damages for breach of contract against HCSA, an offset of claims asserted by HCSA, and recovery of post-petition damages. This Complaint was

followed by a First and Second Amended Complaint that did not materially differ from the original on June 5, 2000, the Bankruptcy Court granted HCSA's Motion for Summary Judgment. Aside from administrative expense claims, HCSA is the sole remaining creditor in Ghidoni's second Bankruptcy case.

Appeal from Bankruptcy Court's Judgment

In this Appeal from the Bankruptcy Court's Judgment, Ghidoni urges that the Bankruptcy Court erred in granting Summary Judgment for HCSA. Specifically, Ghidoni argues that the Bankruptcy Court erred in finding 1) that the Rooker/Feldman Doctrine precluded jurisdiction; 2) that the objection to Judge Curry was not filed with the clerk; 3) that the objection to Judge Curry was waived and subject to laches; 4) that the collateral attack on Judge Curry' s Judgment was subject to res judicata; *5)* that the Judgment precludes evidence of the jurisdictional defect in the record; and 6) that Ghidoni's post-petition claims cannot be asserted in his adversary proceeding. Ghidoni further argues that the Bankruptcy Court erred in making a finding of fact in a summary judgment proceeding and entering an order in a summary judgment proceeding that makes findings of fact but grants no relief.

In response, HCSA argues that the Bankruptcy Court properly granted summary judgment because 1) Ghidoni' s collateral attack on the Final Judgment is barred by *res judicata* 2.) the Final Judgment was valid on its face; 3) Ghidoni did not comply with Tex. Gov. Code § 74.053; 4) even if § 74.053 was complied with, Judge Curry's refusal to recuse himself makes his Judgment voidable, not void; 5) the Rooker/Feldman Doctrine applies; and, 6) there was no error in the Bankruptcy Court' s findings of fact because there existed no genuine issues of material fact.

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. CIV. P. *56(c).* A dispute as to a material fact is genuine where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party" on the disputed issue. *Anderson v. Liberty Lobby Co.*, 477 U.S. 242, 106 S.Ct. 2505 (1986).

The moving party has the burden of showing that there are grounds for summary judgment. Id. When the moving party has satisfied its burden, the adverse party must establish in its response, by affidavits or otherwise, that there exists a genuine issue for trial. Fed. R. Civ. P. 5 6(e). The Court must review the facts of the case in a light most favorable to the non-moving party to determine the existence of genuine material fact issues. *Williams* v. *Scott,* 35 F.3d *159,* 161 (5th Cir. 1994). However, the non-movant must offer specific facts of significant, probative value to show the existence of a genuine issue and thus avoid summary judgment. *Anderson,* at 249-250.

Finally, the Court looks to the substantive law to determine materiality for summary judgment purposes. *Anderson,* at 248. In the instant case, the Court must apply substantive Texas law. *Solomon v. Walgreen Co., 975* F.2d 1086, 1089 (5th Cir. 1992).

In reviewing the Bankruptcy Court's decision, this Court acts as an appellate court, applying the standard of review employed by the Fifth Circuit. The Fifth Circuit reviews summary judgments *de novo,* but this Court may uphold the Bankruptcy Court's decision on any ground contained in the record. The Court may affirm summary judgment even where the Bankruptcy Court's reasoning may be erroneous. *Thompson v. Georgia Pacific Corp.,* 993 F.2d

1166, 1167-69 (5th Cir. 1993).

The Rooker/Feldman Doctrine bars litigants from seeking judicial review of state court decisions in lower federal courts, In its response, HCSA argues that Rooker/Feldman controls in the instant case. Ghidoni could have appealed his jurisdictional issue, stemming from Judge Curry's Final Judgment, to the Fourth Court of Appeals. In the alternative, Ghidoni could have directly attacked the Judgment in the Fourth Court or the Texas Supreme Court. Instead, Ghidoni would ask the Bankruptcy Court and now this Court to review the Final Judgment of the State court on the jurisdictional is sue. Ghidoni argues that the doctrine is inapplicable as he is collaterally attacking a void judgment of a state court. As authority, Ghidoni cites the Fifth Circuit holding that a void state judgment is subject to collateral attack in bankruptcy court. *In re Camp,* 59 F.3d 548, 550 (5th Cir. 1995).

Even if both arguments are given full consideration and found to have merit, Ghidoni's argument fails if it is determined that Judge Curry's Final Judgment was not void. Under Texas law, judgments are void only for lack of jurisdiction over the party or property at issue, lack of jurisdiction over the subject matter of the litigation, lack of jurisdiction to enter the particular judgment, or where the state court lacked capacity to act *Browning v Placke,* 698 S.W.2d *362,* 363 (Tex. 1985).

Ghidoni's argument is based on his perception that Judge Curry lacked capacity to act as a result of Ghidoni's objection to Judge Curry's assignment. It follows that Ghidoni would have this Court find that Judge Curry was disqualified by the objection. HCSA argues that only certain grounds exist for the automatic disqualification of Texas state court judges. It stands to reason that if Judge Curry's actions fall short of one of these grounds, then his Final Judgment would be at most voidable, not void.

The Texas Constitution provides that disqualification is automatic where a judge is interested, where he has a proscribed connection by consanguinity or affinity to a party, or where he was counsel hi the case. Tex. Const. art. V. § 11. It appears from the case law that the constitutional grounds for disqualification are mandatory, inclusive and exclusive. *River Road Neighborhood Assn. v. South Texas Sports, Inc.*, 673 S.W.2d 952 (Tex. Civ. App. - San Antonio 1984, no writ). Failure of a judge to recuse himself based on constitutional disqualification could therefore render a resulting judgment void.

However, non-recusal based on statutory disqualification is merely voidable. That is the case here. The Court finds merit in HCSA' s argument, arid is of the opinion that Judge Curry' s Final Judgment is not void. Therefore, Ghidoni' s argument that the Rooker/Feldman doctrine is inapplicable must fail.

The statutory ground for recusal cited by Ghidoni can be found at Tex. Gov. Code § 74.053. This statute requires an assigned judge to give notice of the assignment to each attorney. §74.053(a). A party may file a timely objection to the assignment, in which case the judge shall not hear the case. §74.053(b). HCSA argues alternatively that, even if its void/voidable argument lacked merit, Ghidoni failed to meet the procedural requirements of § 74.053. The statute requires that such an objection must be filed before the first hearing or trial. § 74.053(c). The Bankruptcy Court found no evidence that any document was filed raising Ghidoni's objection. "Filing", as defined by the Texas rules, requires papers to be filed with the clerk of the court or with the court itself. Tex. R. Civ. Pro. 74. Filing by either means would result, respectively, in a file stamp referring to the date of filing or a notation by the court as to the date of filing. Neither is present here. No official date of recordation is shown for Ghidoni's objection to fudge Curry's assignment. The Court therefore finds that Ghidoni's a objection was not properly

filed under Tex. Gov. Code § *74.053.*

In addition, Ghidoni's collateral attack on Judge Curry's Final Judgment must fail because it is barred by *res judicata.* Ghidoni's assertion that the Final Judgment was void was raised at the State court level in a motion to modify judgment. Furthermore, Ghidoni failed to raise this issue on appeal. Because Ghidoni's collateral attack on Judge Curry's Final Judgment makes the same arguments raised in State court, *res judicata* precludes Ghidoni from raising them here.

The Court finds therefore, that the Final Judgment by Judge Curry is valid on its face. The Court finds that Judge Curry was not disqualified by the objection raised to his assignment. The Court therefore finds that the Final Judgment was not void. The Court further finds that the Rooker/Feldman doctrine applies and therefore Ghidoni cannot properly seek review of the Final Judgment in this Court.

The Court hereby finds that the Bankruptcy Court Properly granted Summary Judgment for HCSA. It is therefore ORDERED that the Judgment of the Bankruptcy Court is, in all things, AFFIRMED.

ENTERED this 3rd day of November, 2000.
H.F. Garcia
United States District Judge

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. 96-50921-K
SA00CA0815
CHAPTER 7

ADVERSARY NO. 00-5026 K

IN RE: DONALD E. GHIDONI
Debtor

DONALD E. GHIDONI,

v.

HILL COUNTY S.A., LTD.

JUDGMENT GRANTING MOTION FOR
SUMMARY JUDGMENT OFDEFENDANT,
HILL COUNTRY S.A. LTD.

Came on for hearing on June 5, 2000 was the "Motion for Summary Judgment and Brief in Support Thereof" ("Motion") filed by Hill Country S.A., Ltd. ("HCSA"), a Defendant herein, and the response thereto filed by the Plaintiff, Donald E. Ghidoni ("Ghidoni"). After considering the arguments of counsel for HCSA, for Ghidoni, and for Nancy J. Ghidoni-Meehan, another Defendant herein, the evidence admitted at the hearing on the Motion, and the pleadings tiled in this Chapter 7 case, the Court has concluded to grant judgment in favor of HCSA and against Ghidoni pursuant to the following mixed findings of tact and conclusions of law pursuant to FED. R. BANKR. PROC. 9014 and 7052.

It is therefore ORDERED, ADJUDGED and DECREED as follows:

1. The Court has jurisdiction of the parties and the subject matter of this Adversary Proceeding pursuant to 28 U.S.C. §§ 157 and 1334, 11 U.S.C. §§ 502, 506 and 507, and FED. R. BANKR. PROC. 3008. This is a core proceeding pursuant to 11 U.S.C. § 157(b)(2)(A), (B) and (O).

2. Ghidoni filed a Chapter 7 bankruptcy case on March 12, 1995, being Case No. 95-50104. HCSA was the principal creditor in that case. That case was later converted to a Chapter 11 bankruptcy case. On January 8, 1996, the Chapter 11 case was dismissed by the Court. On March 7, 1996, Ghidoni filed a Chapter 13 bankruptcy case, being Case No. 96-50921-K. On March 14, 1996, the Court converted the case from Chapter 13 to Chapter 7, and the next day Johnny W. Thomas was appointed as the Chapter 7 Trustee ("Chapter 7 Trustee").

3. HCSA is the only remaining creditor in the Chapter 7 case, aside from the administrative expense claims of the Chapter 7 Trustee and the Chapter 7 Trustee's employed professionals.

4. On March 29, 1996, HCSA filed a Secured Proof of Claim in the amount of $298,831.47.

5. During the course of the current bankruptcy case, Ghidoni has filed multiple pleadings seeking to deny HCSA's claim: (1) On March 7, 1997, Ghidoni filed an objection to HCSA's claim (Docket No. 157-1), and that objection was denied by Order filed on October 3, 1997 (Docket No. 297-1). (2) On September 9, 1997 Ghidoni filed another objection to HCSA's claim (Docket No. 2804), which was denied by Order also filed on October 3, 1997 (Docket No. 298-1). (3) On January 25, 2000, Ghidoni flied another objection to HCSA's claim, coupled with a motion to dismiss

the bankruptcy case, (Docket No. 339), which was denied by Order filed on February 8, 2000 (Docket No. 345). (4) On March 14, 2000, Ghidoni filed still another objection to HCSA'S claim (Docket No. 370). Pursuant to Order filed herein on May 2, 2000, that abjection has been consolidated into this Adversary Proceeding.

6. HCSA's claim originated in litigation filed on December 22, 1992 by Stone Oak, Inc. and Hill Country Water Works Company, as plaintiffs, against Ghidoni, as defendant, and styled Stone Oak., Inc. and Hill Country Water Works Company vs Donald E. Ghidoni, Case No. 92-CI-17421 in the 224th Judicial District Court of Bexar County, Texas (the "State Court Litigation"). On June 18, 1993, Ghidoni's ex-spouse, Nancy J. Ghidoni-Meehan ("Meehan"), intervened as a plaintiff. On July 30, 1993, HCSA intervened as a plaintiff as it had purchased the assets of Stone Oak, Inc. and Hill Country Water Works Company. On August 15, 1994, the parties announced ready and the State Court Litigation was tried to a jury. The Hon. Peter Michael Curry presided at trial. On September 1, 1994, a "Final Judgment" was entered. Among other things, the Final Judgment awarded attorneys' fees, interest arid costs against Ghidoni in favor of HCSA.

7. HCSA abstracted its portion of the Final Judgment on September 7, 1994, and Hill Country Water Works Company abstracted its portion of the Final Judgment on September 8, 1994.

8. On October4, 1994, Ghidoni filed his "Defendant Donald E. Ghidoni's Motion to Modify Judgment and Alternative Motion for New Trial, and Brief in Support Thereof ('Motion to Modify"). The Motion to Modify was denied on November 8, 1994.

9. Ghidoni appealed the Final Judgment to the Fourth Court of Appeals. On January 28, 1998, a written opinion was issued which, among other things, overruled all

of Ghidoni's appellate points of error relating to the award of attorneys' fees in the Final Judgment. A "Judgment" was issued on the same date by the Court of Appeals.

10. Ghidoni filed a petition for review with the Texas Supreme Court. The petition was denied on June 10, 1999. A motion for rehearing was filed, and that motion was denied on July 29, 1999.

11. On February 2, 2000, Ghidoni filed his "Donald E. Ghidoni's Original Complaint (1) Objecting to Claim of Hill Country S.A., Ltd. and (2) For Breach of Contract" ("Complaint"). On March 10, 2000, Ghidoni filed his first Amended Complaint against HCSA, and added the Chapter 7 Trustee, as an additional defendant. On March 14, 2000, Ghidoni filed his Second Amended Complaint against HCSA, and added still another defendant, Meehan.

12. As to HCSA, Ghidoni asserts that, on August 15, 1994, prior to the trial in the State Court Litigation, and based on TEX. GOV. CODE § 74.053, he filed a written objection to the assignment of the Hon. Peter Michael Curry, as a visiting judge, to preside over that trial, that Judge Curry improperly overruled the objection on August 15, 1994 and then presided over the jury trial, and that Judge Curry signed the Final Judgment, which was in turn appealed to the Fourth Court of Appeals and, eventually, to the Texas Supreme Court. As a result, Ghidoni requests that HCSA's allowed secured claim be disallowed, and that this Court enter a declaratory judgment to the effect that the Final Judgment is void on the grounds that the State Court did not have jurisdiction to enter the Final Judgment and that Judge Curry lacked the capacity to act as a court. Ghidoni also seeks to recover damages on account of HCSA's alleged breach of a "CSA Agreement" and, alternatively, to allow an offset against HCSA's claim, and to recover damages for post-petition personal injury and loss of property.

13. Under FED R. CIV. PROC. 56(b), a defendant may move at any time, with or without supporting affidavits, for a summary judgment in its favor. FED. R. CIV. PROC. 56(c) provides that summary judgment is proper if the summary judgment evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." HCSA asserts that there no genuine issues of any material fact exist which would prevent this Court from entering a summary judgment dismissing this litigation. The Court agrees.

14. The provisions of TEX. GOV. CODE § 74.053 provide a non-constitutional means by which a party in a state court proceeding can object to the assignment of a visiting judge to try a case. TEX. GOV. CODE § 74.053 provides as follows:

> (a) When a judge is assigned under this chapter the presiding judge shall, if it is reasonable and practicable and if time permits, give notice of the assignment to each attorney representing a party to the case that is to be heard in whole or in part by the assigned judge.
>
> (b) If a party to a civil case files a timely objection to the assignment, the judge shall not hear the case. Except as provided by Subsection (d), each party to the case is only entitled to one objection under this section for that case.
>
> (c) An objection under this section must be filed before the first hearing or trial, including pretrial hearings, over which the assigned judge is to preside.

> (d) A former judge or justice who was not a retired judge may not sit in a case if either party objects to the judge or justice.

15. The plain language of TEX. GOV. CODE § 74.053 provides that the "objection" to assignment of a visiting judge "must be filed before the first hearing or trial, including pretrial hearings over which the assigned judge is to preside." Here, Ghidoni did not provide any evidence, such as a file-marked copy of the objection or a docket sheet from the State Court Litigation, to show that any objection was filed. Therefore, any objection was untimely because it was not filed before trial.

16. The Texas Constitution lists only the following grounds for automatic disqualification of a state court judge:

> No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such degree as maybe prescribed by law, or where he shall have been counsel in the case. TEX. CONST. art. V., § 11.

Disqualification on these grounds is jurisdictional, cannot be waived and may be raised for the first time after the judgment has become non-appealable. Buckholts Independent School District vs Glaser, 632 S.W.2d 146 (Tex. *1982).* "Disqualification" based on grounds other than the three express constitutional grounds is waivable. See Manges vs Guerra, 673 S.W.2d 180, 185 (Tex. 1984) (once it is established that a judge is qualified under the Texas Constitution, any further challenge to qualification of the

judge is subject to the procedural requirements of TEX. R. CIV. PROC. 18b); Buckholts Independent School District vs Glaser, supra at 140 (disqualification is waivable under statutory predecessor to TEX. *coy,* CODE ANN. § 74.059(c)(4) (Vernon Supp. 1995)); Gaines vs Gaines. 677 S.W.2d 727, 730-31 (Tex. Civ. App. - Corpus Christi 1984, no writ) (the Texas Constitution presents the only non-waivable grounds for disqualification); River Road Neighborhood Assn. vs South Texas Sports, Inc., 673 S.W.2d 952 (Tex. Civ. App. - San Antonio 1984, no writ) (the constitutional grounds for disqualification are mandatory, inclusive and exclusive).

17. This is not the first time that Ghidoni has asserted that the Final Judgment is void. In fact, Ghidoni made this precise same argument at the conclusion of trial in the State Court Litigation when, on October 4, 1994, he filed the. Motion to Modify. His argument was denied by the trial court judge. However, he did not pursue this claimed error by a point on appeal to the Fourth Court of Appeals. Therefore, Ghidoni, who appeared and announced ready for trial in the State Court Litigation, not only had the opportunity to raise the "void" judgment argument at the trial court level, but he did, in fact, raise the issue and then did not pursue the issue on appeal. As a consequence, *res judicata,* waiver and/or laches are applicable as a bar, and he cannot now question jurisdiction. Fehlhaber vs Fehlhaber, 681 F.2d 1015, 1031 (5th Cir. 1982); Buckholts Independent School District vs Glaser, supra.

18. Ghidoni's collateral attack is flawed because the Final Judgment is presumptively valid. An alleged jurisdictional defect must appear on the face of the judgment and in the context of a collateral attack, such as Ghidoni makes here, extrinsic evidence may not be used to prove a jurisdictional defect. Steph v. Scott 840 F.2d 267, 270 (5th Cir. 1988). Here, no defect appears on the face of the Final Judgment. The Final Judgment Is valid and regular on its

face.

19. The Final Judgment entered in the State Court Litigation is a valid and fully enforceable claim against Ghidoni's Chapter 7 bankruptcy estate. Ghidoni's present attack on the Final Judgment raises arguments that could have been raised in his claim objection filed on January 25, 2000, and *res judicata* and waiver operate to bar a further consideration of those arguments.

20. Ghidoni's most recent attack on the validity of HCSA's claim could be treated as a request, pursuant to 11 U.S.C. § 507(j) and FED. R. EANKR. PROC. 3008, to reconsider the February 8, 2000 Order allowing HCSA's claim. Reconsideration of an allowed claim must be "for cause" shown and is wholly discretionary with the Court. Matter of Colley, 814 F.2d 1008 (5th Cir. 1987); Advisory Committee Note to FED. R. BANKR. PROC. 3008. Here, there is no, or insufficient, cause to reconsider HCSA's allowed claim.

21. In the alternative, this Court finds that the Rooker-Feldman doctrine is applicable. Rooker vs Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia Court of Appeals vs Feldman, 460 u.s. 462 (1983); In the Matter of Reitnauer, 152 F.3d 341 (5th Cir. 1998). Ghidoni could have appealed the jurisdictional issue directly or by mandamus. He did neither. Instead, Ghidoni, who has been in a bankruptcy proceeding continuously since March, 1995 (except for a two-month hiatus in early 1996), wants this Court to sit in some sort of super-appellate review capacity over the adverse state court judgment entered against him—a judgment which he appealed in vain to the Fourth Court of Appeals and to the Texas Supreme Court. The Court declines that invitation.

22. Ghidoni's claim for damages is misguided. Any such claims are pre-petition in nature are property of the bankruptcy Estate. They may be asserted only by the Chapter 7 Trustee.

23. All other relief sought by the parties, not granted herein, is denied.

SIGNED this 19th day of June,2000.

UNITED STATES BANKRUPTCY JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-51213

D.C. Docket SA-00-CV-815

In the Matter Of: DONALD E. GHIDONI
Debtor

DONALD E. GHIDONI,
Appellant,

v.

HILL COUNTY S.A. LTD; JOHNNY W. THOMAS,
Chapter 7 Trustee for the Estate of Donald E. Ghidoni,
Appellees.

Appeal from the United States District Court for the
Western District of Texas, San Antonio.

Before SMITH, DUHÉ and WIENER, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellant pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: August 27, 2001

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-51213

In the Matter Of: DONALD E. GHIDONI
Debtor

DONALD E. GHIDONI,
Appellant,

v.

HILL COUNTY S.A. LTD and JOHNNY W. THOMAS,
Chapter 7 Trustee for the Estate of Donald E. Ghidoni,
Appellees.

Appeal from the United States District Court for the
Western District of Texas (SA-00-C V-8 15)

Before SMITH, DUHÉ, and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge